(3)

No. 91-1306

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1306

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. OLANO, JR., AND RAYMOND M. GRAY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent Gray contends (Br. in Opp. 6-8) that this case is moot because the government did not obtain a stay of the court of appeals' mandate. That contention is contrary to the firmly settled principle that the issuance of a court of appeals' mandate has no effect on the power of this Court to review the court of appeals' judgment. See, *e.g.*, *United States* v. *R.L.C.*, No. 90-1577 (Mar. 24, 1992), slip op. 3; *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581-582 n.2 (1983); *Mancusi* v. *Stubbs*, 408 U.S. 204, 206-207 (1972); *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 467 (1947); *Carr* v. *Zaja*, 283 U.S. 52, 53 (1931). The reason for that rule is that a reversal of the judgment of a lower

court by this Court serves to vacate the lower court's judgment and to nullify what was done under the mandate embodying the erroneous judgment. *Villamonte-Marquez*, 462 U.S. at 581-582 n.2. Accordingly, the issuance of the mandate by the court of appeals does not moot this case.[1]

2. Respondent Olano asserts (Br. in Opp. 3) that "at no time * * * did my counsel * * * consent" to allow the alternate jurors to observe the jury deliberations. Similarly, Gray asserts (Br. in Opp. 11) that "[t]he record simply does not support" the court of appeals' assumption that counsel for one of the defendants consented to that procedure on behalf of all defendants. In fact, the record shows that counsel for all the defendants agreed to allow the alternates to be present during the deliberations.

When the district court suggested the possibility of allowing the alternates to observe the deliberations, it stated that "if there is even one person who doesn't like it we won't do it. * * * [U]nless it's something you all agree to, it's not worth your spending time hassling about." Pet. App. 5a n.5; Tr. 10,400. Counsel for one of the defendants initially objected to the procedure. Pet. App. 5a. The next day, however, the district court addressed counsel for all the defendants as follows:

> THE COURT: Do I understand that the defendants now—it's hard to keep up with you, counsel. This is sort of a day by day—but that's all right. *You do all agree that all fourteen deliberate?*
>
> Okay. Do you want me to instruct the two alternates not to participate in deliberation?
>
> MR. KELLOGG: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

Pet. App. 6a (emphasis added).

Although Gray characterizes the district court's statement as "inexplicabl[e]," Br. in Opp. 10, it is easily explained. The district court's statement, and defense counsel's response, clearly show that counsel for all the defendants agreed that the alternates would be permitted to observe, but not participate in, the deliberations.

In any event, the court of appeals decided this case on the assumption "that co-defendant's counsel spoke as counsel for all defendants on this issue." Pet. App. 27a. The court held that, despite defense counsels' consent, respondents' convictions nevertheless had to be reversed. *Ibid.* The government is seeking review of that erroneous legal ruling.[2]

---

[1] Gray notes (Br. in Opp. 8 n.5) that in this case, unlike *Villamonte-Marquez*, the indictment has not been dismissed. That difference is irrelevant. A decision by this Court reversing the court of appeals will vacate the court of appeals' judgment and nullify any actions taken under the court of appeals' mandate. In any event, the district court has stayed further proceedings pending the disposition of the petition. See Br. in Opp. 7.

[2] Gray is incorrect in contending (Br. in Opp. 9) that our petition for a writ of certiorari rests solely on defense counsels' consent to allow the alternates into the jury room. Our basic contention is that violations of Fed. R. Crim. P. 24(c) should not be subject to a rule of automatic reversible error. We believe that principle applies whether or not the defendant has consented to the violation. The fact that the defense did not object to the violation in this case—and indeed consented to it—strengthens our argument, but it does not provide the only basis for review by this Court.

3. Both respondents contend that the court of appeals' decision in this case does not conflict with any decision of another court of appeals. That contention is unpersuasive.

Olano contends (Br. in Opp. 7) that the cases cited in our petition are distinguishable because one of the alternates in this case "did not stay with the jury throughout their deliberations, but instead after one day of deliberations broke up the sanctity of the jury room by leaving and being excused." Olano asserts that in all of the cases we cited "the alternates remained with the twelve jurors until a decision was rendered." *Ibid.* It is not clear why that distinction should matter, but in any event Olano's assertion about the other cases is incorrect. Our petition cites several cases in which courts of appeals declined to apply a rule of automatic reversible error even though the alternates did not remain with the jury throughout the deliberations. See Pet. 7-9 (citing *United States* v. *Jones*, 763 F.2d 518, 523 (2d Cir.) (alternates retired with jury to observe deliberations but were discharged before deliberations were completed), cert. denied, 474 U.S. 981 (1985); *United States* v. *Watson*, 669 F.2d 1374 (11th Cir. 1982) (alternate retired with jury and was elected foreman, but was discharged before deliberations were completed); *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981) (alternate replaced juror after deliberations began), cert. denied, 457 U.S. 1136 (1982).[3]

[3] There is no force to Olano's argument (Br. in Opp. 8-9) that the Constitution requires that a jury consist of 12 persons, and only 12. In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court rejected the contention that the Sixth Amendment guarantee of a trial by jury necessarily requires a trial by exactly 12 persons. The Court concluded that the fact that a jury consisted of 12 members at common law "is a historical accident * * * wholly without significance 'except to mystics.'" *Id.* at 102 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). See also *Colegrove* v. *Battin*, 413 U.S. 149 (1973) (Seventh Amendment right to jury trial does not encompass a right to a 12-member jury).

Gray contends (Br. in Opp. 12-15) that we have "manufactured" a circuit conflict by lumping this case together with cases involving other types of violations of Fed. R. Crim. P. 24(c) that do not result in a violation of the secrecy of jury deliberations, such as allowing an alternate to participate in the deliberations as a thirteenth juror, or substituting an alternate juror for a regular juror after deliberations have begun. But as Gray himself concedes (Br. in Opp. 15 n.8), our petition cites cases involving precisely the same type of violation that occurred in this case, in which the court of appeals nevertheless refused to apply a rule of automatic reversible error. See *United States* v. *Jones*, *supra*; *United States* v. *Watson*, *supra*. See also *Johnson* v. *Duckworth*, 650 F.2d 122 (7th Cir. 1981); *United States* v. *Allison*, 481 F.2d 468 (automatic reversal not required where alternate was instructed to observe but not participate in deliberations), aff'd after remand, 487 F.2d 339 (5th Cir. 1973), cert. denied, 416 U.S. 982 (1974). Gray attempts to distinguish *Jones* and *Watson* on the ground that the alternate was in the jury room for only an hour and a half in one case, and 35 minutes in the other. But he provides no reason to create a rule of automatic reversal only if the alternate observes all of the jury's deliberations. Nor is there any force to his contention (Br. in Opp. 13) that the violation in this case was "different, and more prejudicial, than the other types of Rule 24(c) error." An alternate who actually participates in the jury's deliberations and

casts a vote for acquittal or conviction is more likely to prejudice the defendant than an alternate who silently observes the deliberations. Because the presence of alternates in the jury room is not inherently prejudicial to the defendants, there should be no requirement of automatic reversal in the case of such an error.

4. In support of their claim that the error in this case requires automatic reversal, respondents contend (Olano Br. in Opp. 10-11; Gray Br. in Opp. 16-20) that the presence of alternates in the jury room may have subtle effects on the jurors' deliberations and that it is difficult or impossible for defendants to demonstrate those effects. Respondents, however, overstate both the likelihood of prejudice and the difficulty of proving it. There is no reason to suppose that alternate jurors will disregard the court's instructions not to participate in the deliberations. Any effects on the jury caused by the silent presence of the alternates are likely to be quite minor, and are as likely to favor the defendant as the government. If a defendant nevertheless believes that he may have been prejudiced, the district court has authority to determine "whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). See *Tanner* v. *United States*, 483 U.S. 107 (1987).[4]

Even if violations of Fed. R. Crim. P. 24(c) were not subject to harmless error analysis because of the perceived difficulty of proving prejudice, it would not follow that such violations rise to the level of plain error. The plain error rule protects the process of adjudication at trial by requiring a defendant to make his wishes known with respect to a particular ruling, while at the same time protecting against the risk that a defendant will be unjustly convicted because of a serious default on the part of his attorney. The technical error in this case did not approach the type of "egregious error[]" that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" or results in a miscarriage of justice. *United States* v. *Young*, 470 U.S. 1, 15 (1985). Accordingly, the court of appeals erred in treating the violation in this case as plain error.[5]

5. Finally, Gray contends (Br. in Opp. 20-24) that defense counsel cannot waive a defendant's objection to a violation of Rule 24(c). Gray makes no effort to

---

[4] In an analogous situation, where the district court exercises its discretion to substitute an alternate juror for a regular juror, the defendant is not entitled to reversal absent a showing of prejudice. *United States* v. *Fajardo*, 787 F.2d 1523, 1525 (11th Cir. 1986); *United States* v. *Dumas*, 658 F.2d 411, 413 (5th Cir. 1981), cert. denied, 455 U.S. 990 (1982).

[5] Contrary to Olano's contention (Br. in Opp. 10-11), *United States* v. *Essex*, 734 F.2d 832 (D.C. Cir. 1984), does not support the proposition that it is "plain error for the trial court to permit the alternate juror to retire to the jury room for deliberations." In *Essex*, a juror failed to appear after jury deliberations had been adjourned for the weekend. The court of appeals concluded that the district court committed plain error by allowing the remaining 11 members of the jury to continue deliberations without making any effort to find the missing juror or determine whether there was any reason to excuse him. *Id.* at 834-835.

Olano also cites a superseded edition of Professor Wright's treatise for the proposition that "it is reversible error, even though the defendant may have consented, to permit an alternate to stay with the jury after they have retired to deliberate." Br. in Opp. 9 (quoting 2 C. Wright, *Federal Practice and Procedure* § 388, at 52 (1969)). The current version of that treatise omits that statement and instead discusses the court of appeals' decisions that have refused to apply a rule of automatic reversal. See 2 C. Wright, *Federal Practice and Procedure* § 388, at 391 nn.23, 24 (2d ed. 1982 & Supp. 1992).

demonstrate that the technical violation of Fed. R. Crim. P. 24(c) at issue in this case involved the kind of basic right that can be waived only by the defendant himself. Instead, he asserts that the decision to allow alternates into the jury room was not a matter of trial tactics because "there is no apparent benefit to be obtained by a defendant from consenting to a violation of Rule 24(c)." Br. in Opp. 22. But defense counsel might well conclude that there is a tactical benefit to be gained from consenting to such a procedure. For example, defense counsel might conclude that a larger jury is less likely to convict than a smaller jury, or that the alternates in a particular case are likely to favor the defendant. Defense counsel's decision to allow the alternates into the jury room was not the sort of fundamental trial decision that the defendant must make personally. See generally *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988).[6]

Gray also contends (Br. in Opp. 23) that because "the personal, written consent of the defendant is required for a jury of less than twelve" under Fed. R. Crim. P. 23(b), it is "appropriate to require the personal consent of the defendant to a jury that is subject to the influence of others during their deliberations." In fact, Rule 23(b) does not require the consent of the defendant if the court finds it necessary to excuse a juror for cause after the jury has begun deliberations. In any event, the question in this case is not whether

[6] Olano cites (Br. in Opp. 9) this Court's decision in *Patton* v. *United States*, 281 U.S. 276 (1930), for the proposition that only the defendant himself can waive objection to a violation of Rule 24(c). In *Patton*, however, the Court concluded that a waiver of the right to trial by a jury of 12 "in substance amount[s] to the same thing" as a waiver of the right to trial by jury. 281 U.S. at 290. The Court subsequently rejected that view. See *Williams* v. *Florida*, 399 U.S. 78, 100-102 (1970).

the procedure at trial complied with the requirements of the Federal Rules of Criminal Procedure, but whether the violation of Rule 24(c) requires automatic reversal. In analogous cases involving technical violations of Fed. R. Crim. P. 23(b), the courts of appeals have held that reversal is not required absent a showing of prejudice. See, *e.g.*, *United States* v. *Fisher*, 912 F.2d 728, 731-733 (4th Cir. 1990) (oral consent rather than consent in writing), cert. denied, 111 S. Ct. 2019 (1991); *United States* v. *Smith*, 523 F.2d 788, 791 (5th Cir. 1975) (same), cert. denied, 424 U.S. 973 (1976); *United States* v. *Spiegel*, 604 F.2d 961, 965 (5th Cir. 1979) (defense counsel, rather than defendant, stipulated to a jury of less than 12), cert. denied, 446 U.S. 935 (1980); *United States* v. *Roby*, 592 F.2d 406 (8th Cir.) (same), cert. denied, 442 U.S. 944 (1979).[7]

[7] Gray contends (Br. in Opp. 3, 5-6 & n.3) that respondents have raised other "substantial" issues that "will inevitably result in a reversal and new trial" even if this Court grants the petition and reverses the decision of the court of appeals. The short answer to that contention is that the court of appeals did not consider those additional issues and they are therefore not before this Court. Moreover, Gray's discussion of the other issues raised in the court of appeals is one-sided. For example, he states (Br. in Opp. 5-6) that "one of the jurors was inexcusably absent during an afternoon of the trial but yet the district court allowed the trial to continue." In fact, the juror was not "inexcusably" absent, but instead became ill during the luncheon recess on the 28th day of trial. Counsel for the defendants discussed the situation and agreed to continue with the testimony in spite of the juror's absence. The juror returned the next morning and, as agreed by counsel, was provided with a transcript of the prior afternoon's proceedings. See R. 6,247; Olano Gov't C.A. Br. 25.

For the foregoing reasons, and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

APRIL 1992